

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

CITY COUNCIL CHAMBERS JANUARY 21, 2003

MEMBERS PRESENT: Chairman Charles Le Blanc, Vice-Chairman James Horrigan; Bob Marchewka, Alain Jousse, Robert Marchewka, Nate Holloway; David Witham and, alternate, Arthur Parrott

MEMBERS EXCUSED: Christopher Rogers

ALSO PRESENT: Lucy Tillman, Planner

Chairman Le Blanc read the notice at the bottom of the Agenda concerning the process for filing a Motion to Re-consider and/or an Appeal with the Rockingham County Superior Court.

I. Approval of the Minutes

Requested change, on page 16: "citing" changed to "siting".

A motion was made and seconded to accept the corrected minutes from the meeting of December 17, 2002 and it was approved unanimously with a 6-0 vote. Arthur Parrott excused himself from the vote, as he did not sit at that meeting.

II. Old Business

A. Request for One-Year Extension of Time for Anthony Giovannettone, Owner, requested by Bernard W. Pelech, Esq., for property located **off Lang Road**. Said land is shown on Assessor Plan 286, Lot 22A and lies within the General Business District.

Vice-Chairman Horrigan stated that the Petitioner died recently and Lucy Tillman clarified that the letter had come into the department prior to his death and the Department was assuming that the request was being handled by the Estate.

DECISION OF THE BOARD

Mr. Marchewka made a motion to grant the request and Mr. Parrott seconded. Mr. Marchewka stated that the letter didn't address the circumstances, but most of the Board was aware of the death of Mr. Giovannettone and over the last several months he was unable to proceed forward on this project as he had intended. It was well within the Board's boundaries to grant the one-year extension. Mr. Parrott concurred with Mr. Marchewka.

The motion to grant the extension until April 15, 2004 passed unanimously by a vote of 7-0.

B. Request for Re-Hearing for Raymond A. Ramsey, Owner, requested by Thomas M. Keane, Esq., for property located **off Kearsarge Way**. Said land is shown on Assessor Plan 218, Lot 22 and lies within the General Business District.

Mr. Parrott reclused himself from this hearing.

DECISION OF THE BOARD

Vice-Chairman Horrigan made a motion to deny the request for re-hearing. Mr. Jousse seconded. Vice Chairman Horrigan stated that the Board could grant a request for re-hearing on two grounds. One ground was that new evidence had arisen that was not available to the Petitioner at the time of the first hearing. That clearly was not the case from reviewing the request. The second ground would be if the Board had made a technical procedural error to the detriment to the Petitioner. They had a request from the Petitioner and a rebuttal from Mr. Ramsey's attorney and he did not feel that the Board had made a procedural error and there were no grounds for re-hearing. Mr. Jousse concurred with Vice-Chairman Horrigan.

The motion to deny the re-hearing passed unanimously by a vote of 6-0.

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**C. Request for One-Year Extension of Time for Seacoast Trust, Owner.** Requested by Peter G. Weeks, PGW Real Estate Consulting, Agent for Seacoast Trust, for property located at **150 Route One By-Pass**. Said land is shown on Assessor Plan 231, Lot 58 and lies within the Single Residence B District.

Vice-Chairman Horrigan made a motion to grant the request for an extension. Mr. Jousse seconded. The Petitioner had given evidence of some progress on this development. They had placed a letter of credit with the City and had completed some parking improvements as well. This was a project that abuts a residential neighborhood so it was in everyone's interest that the Petitioner proceed as carefully as possible to ensure that a good job was done with the expansion. Mr. Jousse agreed with Vice-Chairman Horrigan. The Petitioner had stated that they were doing some modifications to the interior of the addition that they had originally planned and it was going to take a little longer to get things completed. They had started on the project already and he felt that a one-year extension should be granted.

The motion to grant the one-year extension to January 15, 2004 passed unanimously 7-0.

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III. Public Hearings

1) Petition of **Shannon Realty Trust, owner**, for property located at **85 Heritage Avenue** wherein a Variance from Article II, Section 10-209(13) is requested to allow the sale of used cars on a lot abutting a residential district. Said property is shown on Assessor Plan 285 as Lot 5 and lies within the Industrial district. Case # 12-2

SPEAKING IN FAVOR OF THE PETITION

James Shannon, owner of Shannon Realty Trust, and his brother, Steven, were both present. James Shannon addressed the Board. Mr. Shannon felt that this was a reasonable request and would add the ability to sell 3 cars at a time to their operation. They had plenty of space and there were existing parking places that would be used. The lot consisted of 3 acres and he provided pictures of the back of the property, which abuts Patriot's Park. There was a question of possibly putting up some sort of a fence but there was quite a bit of green space between the two properties. From the fence line there was an additional 70' that was their property that was covered with trees.

Chairman Le Blanc asked for clarification of where the 70' was from. Mr. Shannon indicated that it was from the fence.

Vice-Chairman Horrigan asked what the building was currently used for? Mr. Shannon indicated that it was being used for a trucking company and a cleaning company. The building was 7,400 square feet of which Case Transportation takes 3,600 and Sharp Cleaners rented the rest.

Steven Shannon indicated that they presently owned 8 tractors and 14 trailers and they come and go all over the country. They would like to pick up high end used cars in their travels on their own tractor-trailers. He does not feel that 3-4 more cars on the lot would cause any problems.

Vice-Chairman Horrigan asked if this would be an additional use of the site rather than a replacement of the current use? Mr. Shannon indicated that that was correct.

Chairman Le Blanc stated that the plan showed places for 3 cars on the property yet they had mentioned 3-5 cars. An abutter letter indicated that they did not object to this Petition as long as they didn't exceed the 3 cars that was requested. Mr. Shannon indicated that 3 cars would be fine.

Mr. Witham asked if the Shannons were familiar with the stipulations that the Planning Department had recommended. The Shannons were not and reviewed the same.

Mr. Parrott asked how the Shannon's felt that the sale of used cars was consistent with the Industrial district. The Shannon's indicated that they were not familiar with the requirements of the Industrial district. Mr. Parrott wanted to make the point that he felt it was an incompatible use and it was contrary to the city's intent. Mr. Parrott also inquired about advertising and the Shannons indicated that they would probably advertise in the newspaper and would not be putting up any additional signs other than a "For Sale" sign on the cars.

Chairman Le Blanc indicated that sale of vehicles are allowed in the Industrial District by Special Exception. He indicated that they would like to add a stipulation addressing repairs. He asked if they were planning to repair vehicles in any way? Mr. Shannon indicated that they would do minor repairs, not engine work, but brake jobs and tune-ups. They do repairs now and have done so for the past 11 years. These repairs are done inside the building and they have an Inspection Station license for New Hampshire.

Chairman Le Blanc also asked about a stipulation for no outdoor storage of vehicles or parts of any kind associated with the for sale vehicles. Mr. Shannon was agreeable to that stipulation.

Chairman Le Blanc indicated the third stipulation would be that the existing vegetative buffer remain as shown on the plan that was submitted.

Chairman Le Blanc indicated that another stipulation would be that they not exceed 3 vehicles for sale. Said vehicles would be displayed as shown on the site plan as submitted and would be displayed at least 50' from all lot lines. Any expansion would have to come back before the Board for additional relief.

Mr. Witham asked why they didn't qualify for a Special Exception and Ms. Tillman stated that they only reason they had to request a variance was because they abut Patriot's Park.

SPEAKING IN OPPOSITION:

Bob Wynn, of 115 Heritage Avenue, indicated that he had AirBourne Express as a tenant in his 24,500 square foot building and he wanted to address some public concerns that he had. When he purchased his property, as an investor, he took into account a number of factors, one of which was the zoning and the application of the zoning laws to maintain the consistency of the property use. He indicated that one of the five criteria for the granting of the variance was that it would benefit the public interest. He does not see any immediate detrimental effect if they were going to have 3 cars on the opposite side of the property from where his property was but he was concerned about the long term. He stated that a lot of the surrounding property owners would be doing improvements on their properties and he didn't want to see a hodge-podge of activity that was inconsistent with the nature of the Industrial Zone.

Chairman Le Blanc asked Mr. Wynn if he felt that 3 cars parked on the side of the building for sale would be a detriment to his investment? Mr. Wynn indicated that he did not. If there was no expansion and no outdoor advertising he did not see where it would be an impediment to his property.

DECISION OF THE BOARD

Mr. Marchewka asked if any further expansion of the use would have to come before the Board? Chairman Le Blanc and Ms. Tillman confirmed that that would be correct. The stipulations would prohibit any further expansion without further approval.

Mr. Horrigan asked if it would be possible to add another stipulation that there would be no "Special Event" signs.

Mr. Parrott made a motion to deny the Petition. Mr. Witham seconded for discussion. Mr. Parrott felt that the variance would be contrary to public interest, as testified to by Mr. Wynn, it is closer to housing than is allowed by the variance and the business is incompatible to the businesses in that area as well as incompatible with the intent of the Industrial Zone. Mr. Parrott indicated that they had heard testimony from the owners that they don't understand the zone but they also told the Board that they have run a successful business for many years so they currently have a reasonable use of the property. This request was not consistent with the other businesses. The requested variance was not consistent with the spirit of the ordinance. The sale of used cars was not consistent with the other businesses in the Industrial Zone. There would not be any substantial justice. The business that was currently there had been operating successfully so an additional business was not substantial justice. Down the road, if they came back and expand this business, the surrounding properties would be diminished. The zoning ordinance was specific in the activities in that are allowed in the various zones. This was an Industrial Zone and selling cars in that zone was incompatible. The variance would injure the public and private rights of others as this would be setting a precedent and in this particular case it violates the minimum of the 200' setback to residential districts.

Mr. Witham indicated that he would not be supporting the Motion and felt it should be granted. He felt that the sale of used cars was allowed in this zone. It doesn't meet the criteria of a Special Exception because of a 200' setback from a residential unit. Mr. Witham felt that that issue was addressed by the vegetative buffer that exists. In terms of the 200' separation, they were not talking about a used car lot but rather 3 cars in an existing parking lot that was approximately 250' away from it's property line. He felt that this was allowable in this zone by Special Exception and that the criteria for the variance were met. He did not feel the request was contrary to the public interest and he felt it wasn't a detriment to the public interest. He did not feel that the variance would hurt the public or private rights of others. He felt it was consistent with the spirit of the ordinance in the sense that he felt it was a reasonable use of the property. He felt that substantial justice would be done by granting the variance as this use would be allowed by special exception, except for a couple of minimal requirements. He also felt that there would not be any diminution of property values. The neighbor testified about his concerns about this trend and what might happen but Mr. Witham did not see any proof that the values of any surrounding property would be diminished. Therefore, he would not be supporting the motion.

The Motion to deny the variance was denied by a vote of 1-6.

A motion was made by Mr. Witham to grant the motion as presented and advertised, with the following stipulations:

- That no more than three vehicles be displayed "For Sale". Said vehicles shall be displayed as shown on the site plan as submitted and shall be displayed at least 50' from all lot lines. Any expansion shall come back before the Board of Adjustment for additional relief.
- That all vehicle repairs take place within an enclosed building. There shall be no engine repairs or auto body repairs onsite.
- There shall be no outdoor storage of vehicles or parts of vehicles of any kind associated with the "For Sale" vehicle business.
- That the existing vegetative buffer remain as shown on the plan.

- Signage will be limited to 1 ½ sf per vehicle and must be displayed on the windshield of the vehicle. No allowance of “Special Event” signage with respect to the used cars.

Mr. Holloway seconded. Mr. Witham stated that he supported this Petition for a variance and for the record he ran through his reasons once again. Mr. Witham did not feel that the variance was contrary to the public interest or any disinterest to the public, the zoning does interfere with the owner’s reasonable use because the zoning does allow this by Special Exception and they only had 2 categories where they didn’t meet the requirements. One was the screening, which he felt the natural vegetation satisfied and the other was a 200’ separation that he felt was excessive for 3 parking spots that were 250’ away. He did not feel that there would be any injury to the public or private rights of others. He believed this was consistent with the spirit and intent of the ordinance as he felt this was a reasonable use. He felt that substantial justice would be done by granting the variance since the issues were allowed by special exception. He did not feel that there would be any diminution of property values.

Mr. Holloway stated that he agreed totally with Mr. Witham.

Mr. Marchewka stated that he supported the motion and added that it was not the Boards intent to allow used car lots in industrial zones but he felt that the proposed use was consistent with the current use of the property. He felt that this was an expansion of the existing business and a very minimal one.

Mr. Horrigan stated that the motion was before them because it abutted a residential district. He supported the motion but did add that he was always concerned about proposals to move automobile lots closer to residential areas. However, given all of the other stipulations that had been proposed there would be a very minimal impact on the residential district. Encroachments on residential districts by this type of business are a legitimate concern.

Chairman Le Blanc indicated that he felt 3 parking spaces constituted a used car lot and with the stipulations that have been placed on the variance, he felt the Board had limited any future growth. The fact that there is a fairly large vegetative buffer between the useable property and the residential area mitigates the problem that they have with the 200’ buffer.

The motion to grant as presented and advertised, with the above referenced five stipulations, passed by a vote of 6-1.



2) Petition of **James G. Bolduc and Joanne M. Stella, owners**, for property located at **25 Ridges Court** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow a 16’ x 20’ deck with two sets of stairs having: a) a 6’ side yard where 10’ is the minimum required, b) a 23’ setback to the property line abutting Ridges Court where 30’ is the minimum required; and, c) 24.6% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 207 as Lot 57 and lies within the Single Residence B district. Case # 12-5

SPEAKING IN FAVOR OF THE PETITION

Joanne M. Stella and James G. Bolduc, owners, were present. Ms. Stella started by describing their property. The address was always 25 Ridges Court but the aesthetic front of the house was really on Fernald Street and was a strange set up. Their property borders both streets. The Ridges Court side was actually the back of their house. When they first purchased the house there was a small attached shed that covered almost the same footage area that they are proposing. They have a very small cape. The first floor didn’t have a dining room and the kitchen was very small.

They went around to all of their neighbors and explained what they were going to do. Everyone was in favor of it and were pleased with what they were planning. There was one person who was never home and one who was a renter and they weren’t able to get in touch with the owner. The direct abutters all signed. Because of the location of their house, being on two different streets, this was the only place on their property that they could put a deck

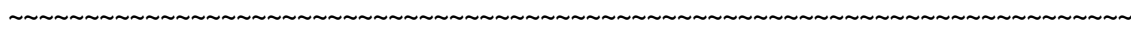
and still access the water view. The end of Fernald Street was an inlet that basically accounts for a lot of the value of their property, even though it was a small piece of property and a small house. Basically, the only place from their back yard that they can see the water was going to be that three or four feet that was going to extend out from the back of their house. If they built the deck without encroaching on the 23' setback, there wouldn't be any place on the deck that someone could see the water. By building this deck, it wouldn't hinder any of the abutter's view of the water. Ms. Stella and Mr. Bolduc are expecting a child in about 8 weeks and they didn't want to have to build steps down from the back door and then onto a deck. This was why they wanted the deck to be over 18" high. With small children, if the deck comes right off of the back door, they could simply put gates up. It would also be dangerous in the winter to have to step down carrying a baby or with small children opening the door and having to step down. They wanted to come out past the side of the house because that is the only side of the house that gets direct sunlight.

DECISION OF THE BOARD

Mr. Marchewka made a motion to grant the variance as presented and advertised. M. Jousse seconded. Mr. Marchewka stated that there were several variances being requested but combined, they didn't amount to a great deal of relief and constitute a reasonable use of the property. The requested variance would not be contrary to the public interest. The applicant showed that by the way that they designed the deck, going to great length to contact the neighbors and getting input and siting the deck in such a way that it doesn't interfere with other people's view. Special conditions exist with respect to the property. Literal enforcement of the ordinance would result in an unnecessary hardship. This was a very small lot from a very old subdivision. The Board is often called upon to look at this type of property and how an expansion might be granted considering today's zoning. He felt this was a very unique setting. It bordered on two streets and was a very narrow lot and therefore no fair and substantial relationship existed between the general purposes of the zoning ordinance and the specific restriction that would be placed on this property which would not allow basically any expansion. The variance would not injure the public or private rights of others. The requested variance was consistent with the intent of the ordinance. Substantial justice would be done by granting the variance as it allows an expansion of the applicants use of the property without expanding the physical building with respect to a very minimal expansion. Finally, Mr. Marchewka felt that granting the variance would not diminish the value of the surrounding properties and would probably increase property values in the area.

Mr. Jousse agreed with Mr. Marchewka that the granting of the variance would not diminish the surrounding property values. Otherwise, the neighbors would not have signed the petition, agreeing to the expansion that the applicant is requesting. Substantial justice would be done by granting the variance. It was consistent with the spirit of the ordinance. The hardship existed by the size of the lot and the location of the lot. These lots were created many years ago before the present owners existed. The present zoning ordinance is really the hardship as is the case with many of the lots in the Portsmouth area. The granting of the variance would not be contrary to the public interest.

The motion to grant as presented and advertised passed unanimously by a 7-0 vote.



3) Petition of **Guthrie Swartz, owner**, for property located at **33 Johnson Court** wherein a Variance from Article III , Section 10-302(A) is requested to allow a 5' x 16' one story addition with a 20'± rear yard where 25' is the minimum required. Said property is shown on Assessor Plan 110 as Lot

SPEAKING IN FAVOR OF THE PETITION

Anne Whitney, architect for the project, spoke. She presented a letter to the Board that she had received from an abutter back in June. Ms. Whitney indicated that they had a particularly large lot, almost ¾ of an acre with an existing residence. The entire property was within a 100' wetland buffer so they had gone through the City Conservation Commission and the Department of Environment Service for approval of the addition. Of the three additions that they are putting on the house that required DES approval, only one of them had to come before the Board because it didn't meet a rear setback. This was because it was an irregular shore edge. The addition would

be going on the right side of the house, as a 5' X 16' addition. They were taking an existing living room that was the width of the house but only 10'8" wide and bringing it out an additional 5', thereby allowing them to create a good sized living space. The setback was to the high water mark so in reality there weren't any buildings for several hundred feet, across the South Mill Pond. The steps that are on the original plan would come off and would be eliminated. With all of the additions on the property, they were bringing the coverage up to 4% where 30% is required.

Chairman Le Blanc asked if the part that had the little addition with the flag flying off of it was considered the front? Ms. Whitney confirmed that it was. The address was Johnson's Court so that was the front setback even though the house was oriented towards the side.

Vice Chairman Horrigan asked exactly where the setback was and Ms. Whitney pointed out on their plan exactly where the setback was.

DECISION OF THE BOARD

Mr. Parrott made a motion to grant the petition as presented and advertised. Mr. Horrigan seconded. Mr. Parrott stated that the lot was 36,900 square feet and only 5,000 were required in that zone so it was a large lot that can stand more building very easily. The requested variance would not be contrary to public interest. The adjacent abutter was the South Mill Pond. Clearly the house was situated such that this was a reasonable addition on that side of the house. No fair and substantial relationship existed between the general purposes of the zoning ordinance. The variance would not injure the public or private rights of others. One of the neighbors wrote and fully supported the plan and a major abutter was the South Mill Pond. The requested variance was consistent with the spirit of the ordinance as it was going to improve the house and the lot was way oversized based on the zoning requirements. Substantial justice was done by granting the variance as it was going to improve the house and the neighborhood. Granting the variance would not diminish the value of the surrounding properties and would actually improve the value of the surrounding properties.

Mr. Horrigan concurred with Mr. Parrott. He felt that the unique setting of the house was already located adjacent to an irregular shoreline and it was very difficult to do any expansion whatsoever on that side of the house without violating the rear setback ordinance. Mr. Horrigan doubted that the zoning ordinance was intended to be rigorously enforced on property in this particular setting.

Mr. Witham indicated that he also supported the motion. Although in the past the Board had taken a tough stand on setbacks from waterbodies, in this situation which already has approval from the DES and Conservation Commission, he believed that this addition would not alter any wetlands or have any harsh impact on this particular project.

A motion to grant as presented and advertised passed unanimously by a 7-0 vote.



4) Petition of **J.H Cahill, owner**, for property located at **2837 Lafayette Road** wherein a Variance from Article IV, Section 10-401(2)(c) is requested to allow the expansion of an existing 1,153 sf non conforming structure by constructing a 1,965± sf addition. Said property is shown on Assessor Plan 286 as Lot 1 and lies within the General Business district. Case # 11-6

SPEAKING IN FAVOR OF THE PETITION

Bernard Pelech appeared on behalf of J. H. Cahill. Attorney Pelech indicated that he had appeared before the Board in November relative to this application and it was approved unanimously as all five criteria had been met. Due to a glitch in the advertising, Ms. Tillman recommended that it be re-advertised. Attorney Pelech stated that he would go through the five criteria that are necessary for the Board to grant the variances. They were basically adding onto the building and relocating the driveway from Lafayette Road to Roberts Avenue. They believed that the variances would not result in any diminution of surrounding property values. The upgraded building, with the enhanced landscaping, would certainly be a benefit to the surrounding property and enhance their values. They believed that the ordinance interfered with the reasonable use of the property. What was being proposed was a reasonable use. They did not believe that there is any fair and substantial relationship between the spirit of the ordinance and this particular parcel of land. They believed there was uniqueness in the land as it was located on the corner of a very small parcel of land. Attorney Pelech knew of no public or private rights that would be effected. Substantial justice would be done by the granting of the variance. The hardship upon the owner if this were denied was certainly not outweighed by any benefit to the public. Conversely, the general public was going to be extremely benefited by the granting of the variances in about four different ways. First of all, the tax base was going to be enhanced by the size of the building; the building was going to be more aesthetically appealing in keeping with the architecture of the area. The building would be constructed to current building codes and the dangerous access to Route 1 would be discontinued and the access would be relocated to Roberts Avenue. It was not going to be contrary to the spirit and intent of the ordinance. The ordinance and the setback requirements basically were enacted after this lot was developed and were actually created through the subdivision process, which resulted in the fact that the building was located within setbacks. Putting the addition on was certainly not going to exasperate the problems with the lot as to setbacks. Everyone knew that the 105' setback on US Route 1 was probably one of the variances most routinely granted by the Board.

In conclusion, Attorney Pelech felt that the five criteria necessary to grant the variance had been met by the owner. The Board felt that back in November and nothing has changed and he hoped that the Board would feel the same this evening.

DECISION OF THE BOARD

Vice-Chairman Horrigan made a motion to grant the Petition as presented and advertised. Mr. Parrott seconded. Vice-Chairman Horrigan stated that, as the Petitioner pointed out, in regard to whether or not the variance would be contrary to the public interest, this was an expansion of a non-conforming business due to normal growth of a dental clinic. Certainly the public interest would be served by the improved aesthetics of this building and also by the entrance off of Roberts Avenue, as opposed to the current entrance off of Route 1. For the same reason, the granting of the variance would not diminish the value of the surrounding properties but would more than likely increase the values of the abutting properties, given the nature of the expansion with careful attention to the architectural details. In regards to the hardship factor, most of these variances involved various dimensional setbacks and one involved a smaller travelway. These are all pretty much created by the setting relative to Route 1 and it was a corner property and virtually any expansion was going to somehow raise these dimensional variances. They would not be able to expand the structure if they held fast to all of the variances. With regard to no fair and substantial relationship existing between the general purpose of the zoning ordinance and specific restriction on the property, again, it was hard to conceive of an argument that would suggest that the expansion of this dental clinic would somehow violate the general purpose of the zoning ordinance. It seemed that it was a legitimate improvement to the property. The variance would not injure the public or private rights of others. Given what they were proposing, it would enhance the rights of both the public and the property owners in the immediate neighborhood. The requested variance was consistent with the spirit or the ordinance. Substantial justice was done by granting the variance and no injustice would be inflicted by the granting of the ordinance.

Mr. Parrott agreed with Vice-Chairman Horrigan and added that he was in favor of the motion but he was not on the Board when the original issue was taken up.

A motion to grant as presented and advertised passes unanimously by a 7-0 vote.

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5) Petition of **Stamatia S. Miminias, owner**, for property located at **17-19 Elm Court** wherein the following are requested: 1) a Variances from Article II, Section 10-208(45) and Article IV, Section 10-401(A)(1)(b) to allow an existing building with two grandfathered dwelling units to be converted into four dwelling units where such use is not allowed, 2) a Variance from Article XII, Section 10-1204 to allow 3 parking spaces to be provided where 6 parking spaces are required, 3) a Variance from Article XII, Section 10-1201(A)(2) to allow an 8’ travel way where 24’ is the minimum required; and, 4) a Variance from Article III, Section 10-304(A) to allow 0% open space where 15% is the minimum required. Said property is shown on Assessor Plan 164 as Lot 10 and lies within the Business district. Case # 1-1

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech appeared on behalf of Stamatia Miminias, owner, of 17-19 Elm Court. He stated that this property was located behind Darleen’s Pizza. It was a very large house on a very small lot. Elm Street was a dead end street and this property was currently a duplex. In order to increase the duplex into four dwellings, four variances were required. The biggest problem was that there was no off street parking. It was also a business district that was a district that was put in place well after the residential units on Elm Court were constructed. Some of the houses date back to the Frank Jones Brewery. The streets are some of the oldest streets in Portsmouth. With the growth of Islington Street, the business district got placed on these residential areas. This lot was only 2,500 square feet with no off street parking so at the present time there is a deficit of three parking spaces. What was being proposed is an addition a deficit of three parking spaces. Three parking spaces could be created at the rear of the property that would accommodate the additional units that were going to be proposed. In order to put the three parking spaces to the rear of the property, two additional variances would be required. First, the 8’ passage way to allow passage to the right hand side of the building to the parking lot and secondly, the open space would go away so that there would be zero percent open space where 15% is required. The other relief that was being requested was asking for strictly residential use in a business district. The requirements were that there be 1/3 business use. That was probably the easiest variance to pass, as this was just not an appropriate structure for business purposes.

Attorney Pelech addressed the five criteria for granting the variance. Starting with the hardship, the ordinance interferes with the reasonable use of the property. The fact that the property could be used as a duplex does not mean that four units were not a reasonable use of the property. The lot is unique because it was a very large building on a very small lot. It was in the business district but had never been a business structure and it was not in a location that was conducive to a business structure.

Addressing the fair and substantial relationship between the intent of the ordinance and this particular piece of property, Attorney Pelech did not feel there was any fair and substantial relationship. The requirement of 1/3 business and 2/3 residential was not intended to apply to property such as this, who are not on a major throughfare and did not have access to a major throughfare.

Addressing the 15% open space requirement and the 24’ travelway, Attorney Pelech indicated that they were dealing with an existing lot of record. 8’ was all that existed to access the rear of the property. Not much can be done relative to off street parking.

Whether or not any public or private rights of others were going to be interfered with, Attorney Pelech was not aware of any public or private rights of others existing over or upon this land that would be interfered with. There would not be any diminution of surrounding properties. The only thing that was going to occur that would have any effect on surrounding properties was the imposition of the 8’ passageway of the travel way. The addition of the two additional units were not going to cause any diminution of surrounding properties.

Attorney Pelech stated that the public interest would benefit in a couple of ways. Going from a 2 unit to a 4 unit would create 2 additional units of housing. It's fairly well known that there was a shortage of housing in the Portsmouth area. The building was going to be completely gutted and brought to code so from a public safety standpoint it was going to be a safer building. The public would benefit from the enhanced tax rates.

Attorney Pelech stated that the hardship on the owner needed to be balanced against the benefit to the general public. Attorney Pelech did not believe there was any benefit to the general public in denying the variance that would outweigh the hardship upon the owner. Substantial justice would be done by granting the variance.

Attorney Pelech stated that he felt the five criteria had been met to grant the variance.

Mr. Witham asked what was going to happen to the 3<sup>rd</sup> floor, which is currently an attic, when the building was completely refurbished? Mrs. Miminis indicated that the attic was very large and would accommodate 2 bedrooms for each apartment. The second floor would have a kitchen and dining room. The roofline was not going to change, as it is already very high. Ms. Tillman indicated that the contractor had discussed adding dormers to both sides of the attic to make a full third floor but Mrs. Miminis stated that she now has another contractor and the roof is not going to change.

Vice Chairman. Horrigan asked about the present use of the building? Mrs. Miminis indicated that it was currently vacant so that they could begin renovations. The tenants moved out in September and November.

Mr. Parrott asked about the inside and outside dimensions of the building as reflected on the plans. The dimensions did not meet the 500 square feet requirement and no relief was requested. The drawings were extremely sketchy and it was difficult for the Board to work with them.

### **SPEAKING IN OPPOSITION**

Joe Gobbi, who has four rental properties that abut the property, spoke in opposition. His biggest concern is the parking. Mrs. Miminis only has 2 spaces now for a duplex. He has been living in one of his units for the past 7 years and on average with both sides of her duplex rented there have been 8 cars. There has been a constant battle with his rental tenants trying to keep her tenants out of his parking lot. What they end up doing is parking over at the plaza parking lot. In the wintertime, they don't want to walk back and forth so they park in front of the duplex. His second concern is from listening to Attorney Pelech saying that four units would maximize the potential of the property. The parking would require an additional three spaces, leaving no room for the fourth car. On the side of the building where the travelway was being proposed, there are gas meters and he is concerned about the natural gas meters and the potential fire hazard. The parking on Elm Court got so bad at one point that they had to go to the traffic committee and they put no parking on the street so that you can get up and down the street. The houses in the back have been fixed up over the past couple of years and they need access to get back to their houses.

Jade Chea, of 30 Elm Court, spoke in opposition. First she presented an unsigned letter from Garth Lyndes, of 32 Elm Court, who was unable to attend the meeting. Ms. Chea is concerned about the parking. Attorney Pelech indicated that there was no off street parking. As a result they have had two cars parked directly in front of the property on Elm Court. That has made it very difficult for them to get to their homes. At least once a month over the past ten months they have had to call the police department because cars were illegally parked and they were unable to get to their homes. She was also very concerned about emergency vehicles being able to get to her home. Ms. Chea indicated that 100% of the residents on Elm Court were present to speak in opposition.

Vice-Chairman Horrigan indicated that this petition was requesting 0% open space. He asked if the other Elm Court residents have any open space? Ms. Chea responded that her property meets the requirements for open space.

Elton Chea, of 30 Elm Court, spoke in opposition. He agreed with everything that his wife stated but he also wanted to point out that he would like to know from the owner, if the Petition passes, how the work was going to

take place. There was obviously a parking issue. When they started the demolition work, they rented a very small 6' dumpster and that alone created a tremendous amount of traffic problems for them and he would like to know exactly where the trucks, dumpsters, etc. would be without hindering resident traffic.

Mrs. Miminis stated that she has already contacted the gas company and it will be moved to behind or on the other side of the house as soon as possible.

**DECISION OF THE BOARD**

Mr. Jousse made a motion to deny the Petition. Mr. Parrott seconded. Mr. Jousse pointed out, and as reiterated by the neighbors, this would be contrary to the public interest. The existing parking with the current two dwellings would be greatly increased with four dwellings. This was not consistent with the spirit and intent of the ordinance. Granting this variance would do an injustice to the neighbors. Also, the parking problem would be multiplied and would definitely diminish the surrounding property values. The zoning restriction that exists for this particular property is there for a good reason and should be supported. The granting of the variance would injure the public and private rights of others. No fair or substantial relationship has been demonstrated with the general purpose of the ordinance and the specific restriction of the property.

Mr. Parrott stated that this was not proving that it meets the requirements, but rather it was not a permitted use in the ordinance. The information presented to the Board shows on at least one of the units does not meet the minimum floor requirements and they cannot judge whether the other 3 units do or do not because there are no dimensions on the list. With respect to the specific five points, under the hardship, the current use of the property is a reasonable use. The requirements are that the zoning restriction interferes with the property owner's reasonable use of the property. This property has been successfully used as a duplex, even though it does create clear parking problems. If this petition were granted, the parking would only get that much worse. Mr. Parrott also concurs with Mr. Jousse.

Mr. Holloway was going to support this motion but then he went to see the property and considering the parking and the width of the driveway, he now feels that it would be detrimental to the public.

Vice-Chairman Horrigan stated that on the one hand it would be in the public interest to renovate the structure as it almost appears to be derelict but he could not follow the argument concerning the hardship coming from two grandfathered dwelling units in a business zone and that somehow got translated into a need for four dwelling units. It has been pointed out that the property has been used over the years as two dwelling units and he feels the argument about the zoning ordinance recently being changed to the 1/3 non-residential is almost irrelevant. Vice-Chairman Horrigan stated that he fails to see any hardship.

Chairman Le Blanc stated that the spirit of the ordinance was meant, from Article X, Section 101, to promote health, safety and the general welfare in accordance with the master plan, to lessen congestion to the streets, to secure safety from fire, panic or other dangers, to promote health and general welfare. By putting another two units on this very tiny street would be denying those goals that the ordinance is setting forth.

A motion to deny as presented and advertised passes unanimously by a 7-0 vote.

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A FIVE-MINUTE BREAK WAS TAKEN.

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6) Petition of **Padraic Ladd, owner, Michael Brigham, applicant**, for property located at **487 Cutts Ave** wherein Variances from Article II, Section 10-206 and Article IV, Section 10-401(A)(1)(c) are requested to allow the construction of a new three dwelling unit building on a proposed 15,000 sf lot after the demolition of an existing

three dwelling unit building on a 3.41 acre lot which is being subdivided into eight single family house lots. Said property is shown on Assessor Plan 210 as Lot 26 and lies within the Single Residence B district. Case # 1-2

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Pelech spoke on behalf of Michael Brigham, the applicant. The plan was actually the plan that was tabled by the Planning Board, pending action by this Board. The request was to place three dwelling units on a lot that was 21,000 square feet. When they originally submitted the application in November, they believed they were coming before the Board of Adjustment first but it was decided that they had to go before the Planning Board. In the interim, the plans were changed and as a result the three dwelling units are on a lot that is 21,000 square feet in size. There is a three dwelling unit building existing on the lot but it is in bad shape. It does not meet code. They are proposing to demolish that and reconstruct the three dwelling units roughly on the same location. There was some confusion on exactly what lot was being proposed for the new three dwelling unit to go on and as a result the advertising stated a 15,000 square foot lot when they are actually proposing a 21,000 square foot lot.

Attorney Pelech indicated that this property has a history of going before various Boards. It was the site of a proposed assisted living proposal and it was a very unique and difficult property. As the neighbors will tell you, there are numerous problems associated with this property. First, it was located on a pile of ledge. Secondly, the area was plagued with water problems – fluctuation in water pressure, some of which have been diagnosed and are attributable to the National Gypsum Plant which is located in close proximity to the property. The City determined that there was not only lack of water pressure but also pressure fluctuation resulting from problems at the National Gypsum Plant and these problems have not been corrected. This proposal would either correct these water problems by \$300,000 worth of new water lines or by individual wells so that it would not impact the water pressure problems. Concerns have been raised by the church and neighbors regarding the blasting of the ledge. Portsmouth has one of the most stringent blasting ordinance in New England and that ordinances would have to be adhered to.

What was being proposed was an 8-lot subdivision which really was an allowed subdivision. What they were seeking was a three-dwelling unit to be constructed on one of the lots to replace the three dwelling unit structure that presently exists. That was not an allowed use in the Single Residence A District.

Attorney Pelech then addressed the criteria required to grant the requested variance. Attorney Pelech did not feel that there would be any diminution of properties given the fact that there is presently a three dwelling unit on the property and the proposed unit would be more aesthetically appealing. The access would be different, as it would be from the new cul-de-sac being created which would take traffic away from the area. They are considering relatively high-end, waterview houses which would enhance the property values in the area. Attorney Pelech did not feel that the spirit and intent of the ordinance would be broken. The intent of the ordinance was simply not allowing three dwelling units to prevent over-crowding of the land. These lots would have 7,000 to 8,000 square feet per dwelling unit that is not that much different from surrounding properties. There are some multi-family units in the neighborhood. Substantial justice would be done by granting the variance as they believe the hardship on the applicant did not out-weight any benefit to the general public. He believed that the general public would actually benefit from the unit. The evaluation of the property was going to increase with three units and it would be built to code. The property would be accessed from a much safer area. Since the Simplex case, the test for hardship was a three-part test. Whether or not the zoning ordinance interferes with the reasonable use of the property. Last week the Supreme Court, in an opinion issued on January 10, 2003, decided a case of Rancourt v. City of Manchester, which addressed the hardship issue. There was a large lot of land that a single-family residence was built. They then wanted to build a barn and some horses in the back. The zoning ordinance did not allow this use, as it was a residential district. The Board of Adjustment granted the variance and the Superior Court upheld the variance, saying that they had demonstrated that the keeping of the horses was a reasonable use. The neighbors said that they had a reasonable use of the property as a residence but the Supreme Court said no. As they had 1 ½ unused acres in the back of their property, then that was a reasonable use. In the instant case, Attorney Pelech feels that the three dwelling units on a 21,000 square foot lot were a reasonable use and that the zoning ordinance interfered with that use. The second part of the test was whether or not there was a fair and substantial relationship between the intent of the ordinance and the particular lot in question. The unique circumstances that apply to this lot must be taken into consideration. The lot was going to require considerable engineering due to the large amount of ledge and has significant water problems. Since the assisted living proposal went away, he had

been contacted personally by no less than 5 developers who want to develop this property for single family residences, hotels, motels and anything in between and none of them have come this far. This proposal was for an 8-lot subdivision, retaining the three dwelling units on one of the lots. It has a lot of merit. Whether the zoning ordinance bears a fair and substantial relationship for this particular lot, he doesn't believe so, given the fact that the requirements for the lot area per dwelling are not met, they have to look at the totality of the circumstances regarding the lot.

As far as public and private rights of others, Attorney Pelech did not feel that there were any being interfered with. Public and private rights of others means that there actually have to be some sort of deeded rights which would be effected. This variance was not going to be contrary to the spirit and intent of the ordinance. If you look at the average lot area per dwelling of surrounding lots in the area, they have much less than the ordinance requires. Many of the dwellings have less than 10,000 square feet of lot area. Many are built on pre-existing, non-conforming uses or lots that were created with a prior zoning ordinance.

Attorney Pelech felt that the five criteria necessary to grant the variance had been met. Michael Brigham was present to answer any questions.

David Witham indicated that Attorney Pelech referred to the 3.4 acre lot however it seems like the Board is concerned with the lot that they want to put the three unit structure on. Are all eight lots special and unique? Attorney Pelech stated that that particular lot had the most hardship. Because the lot currently had a three dwelling unit on it, it has special circumstances.

Mr. Jousse requested clarification on the square footage of the lot in question, whether it was 21,000 or 15,000 square feet. Attorney Pelech indicated that actual square footage was 21,678 square feet.

Mr. Parrott asked if the neighborhood used city sewer and Attorney Pelech confirm that it was.

Vice-Chairman Horrigan stated that Attorney Pelech used language such as mitigating or extenuating circumstances and he asked if Attorney Pelech was arguing that somehow there was a right to a three dwelling building as it was grandfathered? Attorney Pelech responded that they did not. He indicated that they could have re-drawn the lines and left the existing 3 dwelling building there however the building was in tough shape, it doesn't meet code, it's not handicapped accessible and they would prefer to take it down and put something up which would be more keeping with what they are proposing for the lot. They are requesting three units because that is what exists there now.

Vice-Chairman Horrigan also asked about the water problems and how they came to the conclusion that they should have a more dense development on the entire lot. Attorney Pelech indicated that there are problems inherent with the whole site that make it difficult to make any viable economic use of the property.

Chairman Le Blanc stated that building a 3 dwelling structure on the lot after the existing one was demolished was essentially changing the character of the area by putting a 3 unit building on an area that is restricted to single residences. Attorney Pelech stated that the Ricci building has 3 or 4 units. So, this would not be the only multi-family in the area.

Mr. Parrott asked whether there was any consideration that this might constitute spot zoning by another means or name because this was a single residence B zone and this was being proposed right smack in the middle of a subdivision where all other units will be single family units. Ms. Tillman indicated that she was not present at the Planning Board meeting so was unaware of the history but did comment that it would be contrary to the Zoning Ordinance.

**SPEAKING IN OPPOSITION TO THE PETITION**

Marilee Clark, of 461 Cutts Avenue, spoke in opposition. She was not concerned about the houses being constructed but was concerned that approximately 20 feet is going to be blasted off the top of the hill. Her home sits on the ledge and her basement will probably sustain some damage as her home is not brand new. She also questioned the need for the apartment to be build within the home setting. Thirdly, but most importantly, is their water problem. It was determined a few years back that the infrastructure needs to be redone.

Kelly Boston, of 465 Cutts Avenue, spoke in opposition. Her property follows the existing driveway down to the apartment. She shared the same concerns as Marilee. Her main concern is what they will do with the existing driveway. If they are not using it will they be digging it up or using it for some of the houses. Her other concern was the blasting. She has a septic system that was put in about 3 years ago. She is also concerned about the water pressure.

Chairman Le Blanc asked if most of the houses were on septic systems or city sewer?

Ms Boston indicated that she looked into getting city sewer but it was difficult to get the piping up on the ledge so she was on septic. Marilee was on septic. The houses by the church are on city sewer.

Peter Careno, of 435 Cutts Avenue addressed the Board. He lives right on the corner of Chase Drive and Cutts. One of his concerns was the blasting. He has all plaster walls and he was concerned about what might happen to the plaster. He was also concerned about the water. He has very low pressure. From his home, he looks down onto the property that they are building on and he has a water view. He is concerned that the new houses are going to block his view.

Jim Stetson, of 465 Cutts Avenue, stated that the applicant's property was a big chunk of land and by granting a three-dwelling unit, would they be opening the door for Ricci to do the same thing? He is concerned about the blasting and what will happen to the driveway.

Attorney Pelech indicated that the driveway will be torn up and seeded and would not exist anymore.

Susan Patroulis, of 355 Chase Drive, spoke about her concerns. Ms. Patroulis and her husband John are both in opposition of the whole project. They have the same concerns that Marilee voiced. They live directly across from the church in a ranch. They live on the border of where the road is going to go through according to the plans. They are wondering how close the road is going to be to their house. They are also concerned about the water. It was mentioned that the National Gypsum has addressed the problem but they haven't noticed any improvement at their house. They get a backlash from their toilet and it sounds like the toilet is flushing automatically. They also put in new facets about 2 years ago and the washers are already gone. She indicated that they are on town water and sewerage.

Attorney Pelech indicated that they are aware of most of the problems that the neighbors have brought up. He met with the neighbors a few years ago on several occasions regarding the assisted living proposal. They have viable concerns. They already have a letter from Tom Cravens indicating that if this project goes forward, they are looking at between \$300,000 - \$500,000 water main improvements. They realize that they will have to strictly adhere to the blasting ordinance. But, that has nothing to do with what was before the Board.

**DECISION OF THE BOARD**

Vice-Chairman Horrigan asked whether they are considering the 3.4 acre lot or the individual sub-divided lot consisting of 21,000 square feet? Ms. Tillman clarified that it will be on the plan as shown. It is a 21,000 square foot lot with a three unit dwelling on it in a single-family sub-division.

Mr. Parrott asked why the Planning Board didn't just create the lots. They were being asked to consider something that had not been created by the Planning Board. Chairman Le Blanc stated that the Planning Board wants to see if they get approval as it may have bearing on whether the plan goes forward or not. But, that was not the concern of

the Board. What they were interested in was the fact that they are looking for a concept approval that they can put a three dwelling unit on a single lot on a single residence area within a single residence sub-division.

Mr. Witham made a motion to deny the petition. Mr. Marchewka seconded. Mr. Witham indicated that the variance would be contrary to public interest in the sense that public interest was to help maintain the character and integrity of the neighborhood that was single family homes. By putting the townhouses in, there would be six garage doors staring at you from the pedestrian level and he does not feel that that was keeping in character with the single family residence area. He did not feel that the zoning restriction interfered with the owner's reasonable use of the property. Just to say that there was a three unit on the lot now, it was not reasonable to simply rebuild it. This was a brand new lot that is a part of a much larger lot so he does not feel that the restriction interferes at all. He felt that there was a fair and substantial relationship between the zoning and the restrictions put on the property. The zoning was created to maintain the character and feel of the single family residences and that was why the restriction was there and this request rules against that. There was some testimony that this could injure the public and private rights of others. Mr. Witham agreed with the presenter that blasting and water issues are not really part of the criteria but there were some other concerns that he agreed with. Mr. Witham did not believe that the variance request was consistent with the spirit of the ordinance. Substantial justice would not be done by granting the variance as they can get eight lots on the property and he felt that two units would take in the same price as a single family home so he doesn't believe a denial would break the bank or be an injustice. In terms of diminishing values of properties, he was not convinced either way. He felt that the water issue was part of the criteria and would leave that open.

Mr. Marchewka agreed with what Mr. Witham stated and felt that the zoning restriction as applied to specific property interfered with the property owner's reasonable use of the property, considering the unique setting of the property and its environment. He felt that a reasonable use of the property is to take it from three units to eight and he did not see how the setting of the property in its environment dictates one of the eight lots should be a three unit building. They are not utilizing the existing foundation or anything like that. He feels that eight lots were a very reasonable use and intensification of the use of the property without sticking a three unit building in a single-family environment. He did not see any hardship for allowing one of the lots to be a multi-unit building.

Vice Chairman Horrigan spoke on the hardship criteria, and whether a fair and substantial relationship existed between the general purposes of the zoning ordinance and the specific restriction on the property. Other than the church on Market Street, it was a single-family neighborhood. It was a remote neighborhood bound by Market Street Extension, the river and the Route-1 By-pass. There are some multi-family dwellings in there but those look like single residences. They were not built as multiple apartments. He felt that the City, in its zoning ordinance, should provide some single family residence zones where people can live their lifestyle as they so choose and most of the people in that neighborhood have made that choice. They certainly haven't heard any neighbors argue that they would like to have multiple unit dwellings there. It appears that the zoning does conform, as well as a zoning code can, to the characteristics of the lot. He does not see a strong hardship argument and it strikes him that the Petitioner's argument is simply that there is a three dwelling unit currently on the lot and he should be allowed to have one later. That argument does not speak to the fairness or appropriateness of the existing zoning code.

Chairman Le Blanc stated that it seemed that it came through loud and clear that this was a single residence area and consciously putting a multi-unit dwelling in this area would detract from it and it was contrary to the zoning criteria that they are looking at.

The motion to deny passed unanimously with a 7-0 vote.

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A motion was made to suspend the 10:00 PM rule and continue to hear the remaining Petitions.

The motion to suspend the 10:00 PM rule passed unanimously with a 7-0 vote.

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7) Petition of **John Samonas, owner, John Bursaw, applicant**, for property located at **3020 Lafayette Road** wherein a Variance from Article II, Section 10-207(2) is requested to allow an existing 2,111 sf Convenience Goods I store to be changed to a 2,111 sf Convenience Goods II store in order to allow the sale of prepared food for consumption off the premises where the maximum area for such a store is 2,000 sf. Said property is shown on Assessor Plan 292 as Lot 152 and lies within the Mixed Residential B district. Case # 1-3

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech spoke on behalf of John Bursaw. He first indicated that there would be no cooking of food on site as mentioned in the Planning Department memo. Currently they are selling coffee and sandwiches that are made off site. There were no plans for a fryorlater or a grill. As there was no cooking, a vent would not be needed. He took issue with the Planning Department surmising that there was going to be some effect on the neighborhood by odor and smoke. They would operate within the hours prescribed by the statute. Their only problem was that the building was only 111' larger than is allowed. 2,000 square feet is the maximum allowed. The building was approved for a Convenience Goods I and a Convenience Goods II simply allows sale of food prepared on site as opposed to food prepared off site. They are not planning on a grill, they are not planning on hamburgers, and they are not planning on fried fish. There would be no issue with odor in the neighborhood.

The site was at the corner of Ocean Road and Lafayette Road. It got put into the MRB district back in 1995 and prior to that it was general business. It had been a convenience store for many years. Prior to Maple Haven Grocery there was another small grocery there. Across the street is Jitto's Restaurant, which served all of the things that they are not going to serve. Across Ocean Road was a big vacant lot and then an oil dealership. Behind the property was the beginning of Maple Haven that was a residential use and was separated by the parking lot. To the south of the property there was a well-buffered space and the beginning of Maple Haven. They did not believe that this would cause any diminution in value to surrounding properties. There would only be one or two additional deliveries a week and there was an approved loading berth on the site plan that was approved when this property was built. There were more than enough required parking spaces on the site. It was at a signaled intersection and the driveway was well away from that intersection and meet all of the requirements and was approved by the Planning Board. He did not believe it was going to create any traffic or safety hazards, it was not going to generate any large amount of new customers. The food that was being offered was pretty much the same that was presently being offered. There was a hardship in that the ordinance interfered with the reasonable use of the property. The building was 2,111 square feet and the ordinance said 2,000. They believe that substantial justice would be done by the granting of the requested variance. There would not be any detriment to the public interest but rather they would benefit. It was not going to be contrary to the public interest by way of safety, there was not going to be any smoke or odors. He did not believe it was going to be contrary to the spirit or intent of the ordinance. It was not 3,000 square feet but rather was only 111 square feet over. No public or private rights were being effected. He did not believe there was a fair and substantial relationship between the ordinance as it was applied to this particular piece of property. Attorney Pelech felt that it was a reasonable use and the ordinance interfered with a reasonable use of the property. Mr. Bursaw was present to answer any questions.

Chairman Le Blanc asked where the soups would be made? Mr. Bursaw indicated that he was not sure where the soups would be made. Some would be purchased already made and would just have to be warmed up. Some soups might be made on the premises.

### **DECISION OF THE BOARD**

Vice-Chairman Horrigan made a motion to grant the Petition as presented and advertised, with the stipulation that there would be no grilling or frying of foods on the premises. Mr. Parrott seconded. Vice Chairman Horrigan felt that this proposal served the public interest as a convenience store. With the stipulation of no grilling or frying, they were not imposing anything new upon them. The traffic conditions may well increase but this was a site on Ocean Road that had very good in and out access. The zoning restrictions as applied to this property interfered with the property owner's reasonable use of the property considering the unique setting of the property in its environment. There is no reason why to interfere with the owner's ability to compete in his particular market. No



fair and substantial relationship existed between the general purposes of the zoning ordinance and the restrictions on the property. The property was abutting a residential zone which was always a concern but this particular proposal would not impact the abutting property owners. The variance would not injure the public or private rights of others. There was no injury to the public but there was a benefit. The requested variance was consistent with the spirit of the ordinance. It was, in a sense, an allowed use of this property, so it certainly was consistent with the intent of the ordinance. Substantial justice was done by granting the variance and in this case they were doing justice to the owner to allow him to have a more viable enterprise. Granting the variance would not diminish the value of surrounding properties. He could not see anything in this particular proposal that could have any effect whatsoever on surrounding properties, with the stipulation.

Mr. Parrott agreed with Vice-Chairman Horrigan. He did not believe there would be any effect, one way or the other, on the surrounding area. He also noted that there were not any residents present to speak so they obviously agreed with that assessment as well.

The motion to grant as presented and advertised, with the stipulation of no grilling or frying on the premises, passed unanimously with a 7-0 vote.



8) Petition of **Parade Office LLC, owner**, for property located at **195 Hanover Street (Parade Mall)** wherein a Variance from Article IX, Section 10-908 Table 14 is requested to allow an additional 15.5 sf of non-illuminated attached signage for "Adecco": a) creating 133.75 sf of flush attached signage where 60 sf is the maximum allowed, and b) 133.75 sf of aggregate signage where 75 sf is the maximum allowed. Said property is shown on Assessor Plan 125 as Lot 1 and lies within the Central Business B and Historic A districts. Case # 1-4

**SPEAKING IN FAVOR OF THE PETITION**

Walter Goode, of Signs of Success, Sign A Rama, spoke on behalf of the Parade Office. This building was unique to the downtown area and they felt that it was the largest office building within the downtown area. They would like to be visible on the façade of the building and, as shown by the photographs, they were proposing a non-illuminated type sign. He did not believe there would be any diminution of value of surrounding properties and the abutting properties have 7,500 square feet of signage yet they are a smaller building. The proposed use would not be contrary to the spirit of the ordinance. The Parade Mall had less than 1% of coverage versus the typical 4% that the ordinance would allow. The granting of the ordinance would benefit the public interest. Mr. Goode's client was an employment agency and the public would need to find them before they could find work. The granting of the variance would give substantial justice.

Mr. Parrott asked if this sign was similar to or compatible with the other signs on the building. Mr. Goode indicated that, with the exception of the AAA sign which was a stand-alone sign.

Mr. Horrigan asked what Street the sign would be on. Mr. Goode indicated it would be Deer Street.

**DECISION OF THE BOARD**

Mr. Jousse made a motion to grant the Petition as presented and advertised. Mr. Marchewka seconded. Mr. Jousse stated that the request of the Motion was to the benefit of the public since it was an employment agency and if somebody needed work they would have to find where the employment agency was. The building was unique as it has a very large façade on three streets. 1% coverage was very small. The zoning restrictions as applied would definitely interfere with the unique setting of the property and its environment. No fair or substantial relationship existed between the purpose of the ordinance and the specific restriction on the property. The variance would not injure the public or private rights of other but, rather, would provide a service. The granting of the ordinance was definitely consistent with the spirit o the ordinance and substantial justice would be done by the granting of the

variance. Mr. Jousse did not see how the granting of the variance would in any way diminish the value of the surrounding properties.

Mr. Marchewka agreed with Mr. Jousse. He felt that to restrict the property to the sign ordinance would not be fair as 7,500 square feet of signage on a building that size was very, very minimal. Because of that, the zoning restriction applied specifically does interfere with a reasonable use of the property and its signage.

Vice-chairman Horrigan stated that the building in question had been controversial both architecturally and aesthetically and the owners have made some attempt to improve the façade but it was his feeling that these signs have improved the appearance of this building. He saw this proposal in that same light. Breaking the barren façade was pleasing to the eye plus it had a lot of informational value as to the location of this business.

The motion to grant as presented and advertised passed unanimously with a 7-0 vote.



9) Petition of **Whalesback Light, LLC, owner**, for property located at **96-98 State Street** wherein a Variance from Article III, Section 10-304(B) is requested to allow a 21.5' x 26.6' one story addition 15' in height where the minimum height required is 20'. Said property is shown on Assessor Plan 107 as Lot 52 and lies within the Central Business B and Historic A districts. Case # 1-5

Attorney Bernard Pelech appeared on behalf of the owners, who were before the Board in July to obtain a variance for the one story kitchen addition to the restaurant that was proposed for 96-98 State Street. That basically was an L-shaped building and what they were proposing to do was fill in the little corner because the kitchen designer didn't have enough room. They would like to fill that corner in and make it a rectangle and it would be the same construction, same height of 15'. They were requesting the same variance as July and do not feel that the granting of the variance would be contrary to public interest. Whether the building is 15' or 20' high was not going to effect the public interest one way or the other. The intent of the ordinance in requiring two story buildings in that area was to prevent a streetscape where you had three story buildings and one story buildings. The architect has put a façade on the outside so that it would be 15' in height, even though it is only a one-story building. The addition was in the back yard or on the side yard even though it fronts on Atkinson Street. The main address was State Street and it would have to be approved by the Historic District Commission. They believe that special conditions existed with respect to the property for which the variance was sought. A literal enforcement of the ordinance would result in an unnecessary hardship, meaning that the ordinance interfered with the reasonable use. They believe that this was a reasonable use of the property and 15' as opposed to a two story building or façade when wasn't necessary was reasonable. No fair and substantial relationship exists between the general purpose of the ordinance and the specific restriction on the property. Given the fact that this was an addition to the rear of the building, he did believe there was a fair and substantial relationship to that requirement. No public or private rights were going to be interfered with. The requested variance was consistent with the spirit of the ordinance. The spirit of the ordinance was intended to have some uniformity to the streetscape but this was based in a rear or side yard and was not going to effect the over all streetscape. They believe that substantial justice was done by granting the variance given the fact that the remainder of the building of the kitchen has been approved for 15'. There would not be any substantial justice and would work a hardship upon the owner that certainly was not outweighed by any benefit to the general public. Requiring this corner to be 20' when the rest of the building was 15' would be out of character. Granting the variance would not diminish the value of surrounding properties. No one opposed any part of this proposal from day one and the neighbors are comfortable with it.

Vice-Chairman Horrigan stated that this would allow the existing windows in the upstairs apartments to still have a view outside. Attorney Pelech indicated that that was a factor in their decision.

**DECISION OF THE BOARD**

Mr. Parrott asked about parking notations on the plan that was submitted and Ms. Tillman indicated that she did not agree with the parking calculation on the submitted plan. She spoke with the engineer and he understood what her concerns were. It was placed on there erroneously. It referred to a variance that was denied by this board back in July and it would be corrected if it passed and went to Site Review so it should be disregarded.

Vice Chairman Horrigan made a motion to grant the variance as presented and advertised. Mr. Parrott seconded. Vice Chairman Horrigan stated that the variance would not be contrary to the public interest as the broader public interest would be the renovation of the building. The notion of the one story addition makes sense because there were existing apartments on the 2<sup>nd</sup> and 3<sup>rd</sup> floors that need circulation of air. The zoning restrictions interfered with the reasonable use of the property. Vice Chairman Horrigan agreed with the Petitioner that, if they required the 20' it would essentially be an empty shell and there was no sense to that. The expanded property would be in conformance with the surrounding properties. There was no fair and substantial relationship between the general purposes of the zoning ordinance and this restrictive use of the property. It made sense for it to be a one-story addition. The variance would not injure the private or public rights of others. The requested variance was consistent with the spirit of the ordinance. Certainly, the ordinance for this particular business district was developed with the intent of encouraging businesses of this type to locate into the area. Substantial justice was done by granting the variance. Granting of the variance would not diminish the value of surrounding properties but rather would enhance their values.

Mr. Parrott agreed with everything that Vice Chairman Horrigan said and added that this had been a successful restaurant location in the past and it was a very logical use of the building.

The motion to grant as presented and advertised passed unanimously with a 7-0 vote.

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10) Petition of **Jude Spain, owner**, for property located at **433 Lincoln Avenue** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 16' x 24' one story addition and a 4' x 8' porch creating 27.5% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 134 as Lot 14 and lies within the General Residence A district. Case # 1-6

SPEAKING IN FAVOR OF THE PETITION

Bob Gray, general contractor, spoke on behalf of Jude Spain. They were proposing a one-story addition to the existing residence for additional living area. The plans showed the area to the side of the existing residence would require the removal of an existing deck that was 12' x 16' and adding on a 16' x 24' addition with a 4' x 8' porch, which would be a total increase of 224 square feet of structure coverage. They wanted to make sure that it didn't conflict with any of the off street parking and didn't want to effect any existing setbacks.

Vice Chairman Horrigan asked how the duplex was divided? Mr. Gary indicated that it was vertically divided and the other condo owner was in agreement with the plans.

DECISION OF THE BOARD

Mr. Marchewka made a motion to grant the variance as presented and advertised. Mr. Witham seconded. Mr. Marchewka stated that, overall, this was a very minimal request. It would not be contrary to the public interest and would not effect any of the surrounding neighbors. The special condition that existed with respect to this property, where the literal enforcement of the zoning ordinance would create an unnecessary hardship, was that this was a typical old lot, subdivided prior to zoning. This was typical of older Portsmouth lots. The owners were proposing a reasonable use of the property with a 2 ½ % building coverage over the maximum was reasonable. Because of that, no fair and substantial relationship existed between the general purposes of the zoning ordinance and the specific

restriction of 25% building coverage that would be imposed on this property. The granting of this ordinance would not injure the public or private rights of others. This variance was consistent with the ordinance. The spirit of the ordinance allowed for residents to improve their homes in a reasonable manner. Substantial justice would be done by allowing the homeowner to improve their residence and it would not diminish the value of surrounding properties, in fact, it would increase the values of surrounding properties.

Mr. Witham concurred with Mr. Marchewka's comments and added that 10% relief to allow a small home to expand was a very reasonable use of the property. They are not requesting any dimensional relief from setbacks.

The motion to grant as presented and advertised passed unanimously with a 7-0 vote.

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**IV. Adjournment**

There being no further business to come before the Board, the Board acted unanimously to adjourn at 11:30 PM and meet at the next scheduled meeting on January 21, 2003 at 7:00 p.m. in the City Council Chambers.

Respectfully submitted,

Jane M. Shouse  
Secretary

/jms